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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

9 NATIONAL SHOOTING
10 SPORTS FOUNDATION, INC.,

11 Plaintiff,

12 v.

13 ROBERT W. FERGUSON,
14 Attorney General of the State of
15 Washington,

16 Defendant.

NO. 2:23-cv-00113-MKD

DECLARATION OF GREGORY
T. GUNDLACH IN SUPPORT
OF DEFENDANT'S OPPOSITION
TO PLAINTIFF'S MOTION
FOR PRELIMINARY
INJUNCTION

16 I, Gregory T. Gundlach, declare as follows:

17 1. I am over the age of 18, competent to testify as to the matters herein,
18 and make this declaration based on my personal knowledge.

19 2. I have been asked by the Washington State Attorney General's
20 Office to provide my opinions on reasonable controls available to the firearms
21 industry to combat the problems of firearms diversion and unwholesome demand.
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I. BACKGROUND AND QUALIFICATIONS

3. I am the Coggin Distinguished Professor of Marketing in the Department of Marketing and Logistics at the Coggin School of Business, University of North Florida. I was previously the John Berry, Sr. Professor of Business at the University of Notre Dame from 1987 to 2003. I have a Ph.D., a J.D., and an M.B.A. in Marketing from the University of Tennessee, Knoxville. I have taught undergraduate and MBA courses in marketing at the University of Notre Dame and the University of North Florida, as well as numerous courses for business executives.

4. My specialty is in the field of marketing. I am the Past Vice President of Marketing for the Academic Council of the American Marketing Association, Past Chair of the American Marketing Association's Special Interest Group on Marketing and Society and Past Associate Editor for the Journal of Public Policies & Marketing. I have served as a member of Editorial or Advisory Boards for the leading publications in the field of marketing. My areas of concentration, research, and expertise include marketing strategy and the public policy issues that attend marketing and marketing strategy.

5. I have extensive marketing experience by virtue of my professional work, teaching, and consultations with branches and agencies of the United States and state governments, large and small companies, professional and trade associations, public and private institutions, and members of the legal community. I have also conducted forensic investigations of marketing and

1 marketing strategy, including analysis of the marketing and distribution practices
2 of members of the firearms industry.

3 6. I have published books and numerous articles about marketing,
4 marketing channel management, and retail trade practices, including articles
5 about marketing, marketing channel management, and retail trade practices found
6 in the firearms industry. A copy of my current curriculum vitae is attached to this
7 declaration as Exhibit 1. My curriculum vitae also lists prior cases in which I
8 have offered expert opinion or testimony.

9 7. I am being compensated for services performed at an hourly rate of
10 \$500. The compensation I receive is not in any way dependent on the outcome of
11 this or any related proceeding, or on the substance of my opinions.

12 II. SUMMARY OF OPINIONS

13 8. Based on my study, expertise, and experience, I have reached the
14 following conclusions. First, there are widely acknowledged concrete steps that
15 firearm industry members can take to reduce gun diversion through gun
16 trafficking, straw purchasing, and theft, and research demonstrates the
17 effectiveness of such steps. Second, the firearm industry, including the National
18 Shooting Sports Foundation (NSSF), has long understood what these steps are
19 and that they are necessary to protect public safety. Finally, other industries
20 involving dangerous products have long adopted similar types of reasonable
21 controls to those at issue here.

A. Background on Firearm Diversion and the Role of Federal Firearm Licensees

9. “Firearm diversion” is any movement of firearms from the legal to the illegal marketplace through an illegal method or for an illegal purpose.¹ Some distinguish “trafficking” as more limited than “diversion,” where trafficking is the illegal diversion of legally owned firearms from lawful commerce into unlawful commerce often for profit.² Under this definition, a criminal who steals a firearm from a licensee for his own personal use is participating in diversion but not trafficking.

10. Individuals not legally allowed to purchase or possess firearms, and those who use firearms in the commission of a crime, obtain their firearms through a variety of sources. This may include federal firearms licensed (FFL) retailers who are willing to sell under the counter; strawman purchasers who buy

¹ Bureau of Alcohol, Tobacco and Firearms & U.S. Dep’t of the Treasury, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* (June 2000); Bureau of Alcohol, Tobacco and Firearms & U.S. Dep’t of the Treasury, *Crime Gun Trace Reports (1999) National Report*, Nov. 2000, at 41, <https://www.atf.gov/resource-center/docs/ycgii-report-1999-highlightspdf-0/download>.

² Bureau of Alcohol, Tobacco and Firearms & U.S. Dep’t of the Treasury, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* (Nov. 2000).

1 guns on behalf of others; guns stolen from commercial places, common carriers
 2 (like FedEx or USPS), vehicles, and homes; firearm traffickers who buy firearms
 3 in loosely regulated jurisdictions and resell them elsewhere; and unlicensed
 4 sellers who buy and resell firearms.³ Gun shows are another source.⁴ Multiple
 5 purchases of firearms over a short period, or single transactions involving
 6 multiple firearms (i.e., multiple sales), have also been associated with use in
 7 crime.⁵

8 11. Before laws prohibited public release of ATF data,⁶ an early study
 9 and published report by the Bureau of Alcohol, Tobacco, and Firearms (now the

11 ³ *Id.*

12 ⁴ *Id.*

13 ⁵ *Federal Firearms Act of 1976*, H.R. Rep. No. 94-1103, at 28 (1976); U.S.
 14 Dep't of Justice & Bureau of Alcohol, Tobacco, Firearms and Explosives,
 15 *National Firearms Commerce and Trafficking Assessment (NFCTA): Firearms*
 16 *in Commerce — Volume Two: Crime Gun Intelligence and Analysis* (Jan 11, 2023),
 17 [https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-](https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-crime-guns-volume-two)
 18 [assessment-nfcta-crime-guns-volume-two](https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-crime-guns-volume-two).

20 ⁶ Samantha Raphelson, *How The NRA Worked To Stifle Gun Violence*
 21 *Research*, NATIONAL PUBLIC RADIO (April 5, 2018), [https://www.npr.org/](https://www.npr.org/2018/04/05/599773911/how-the-nra-worked-to-stifle-gun-violence-research)
 22 [2018/04/05/599773911/how-the-nra-worked-to-stifle-gun-violence-research](https://www.npr.org/2018/04/05/599773911/how-the-nra-worked-to-stifle-gun-violence-research);

Bureau of Alcohol, Tobacco, Firearms and Explosives) (ATF) found that, of 1,530 trafficking investigations from 1996 to 1998 involving 84,128 diverted firearms, FFLs were associated with the largest number of diverted firearms—over 40,000 firearms.⁷ This includes unscrupulous and corrupt FFLs that do not follow existing laws and engage in illegal sales.⁸ It also includes nonstorefront/nonstocking “kitchen table” FFLs who conduct sales out their homes,⁹ their automobiles,¹⁰ or through businesses that do not stock firearms or take precautions against theft.¹¹ The study also found that gun shows were

Nidhi Subbaraman, *United States to Fund Gun-Violence Research After 20-Year Freeze* (Dec. 17, 2019), <https://www.nature.com/articles/d41586-019-03882-w>.

⁷ *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, *supra* note 2.

⁸ *Id.*

⁹ Julius Wachtel, *Sources of Crime Guns in Los Angeles, California*, 21 POLICING: AN INT’L J. POLICE STRATEGIES & MGMT. 220, 222 (1998), <https://www.policeissues.org/Sources.pdf>.

¹⁰ U.S. General Accounting Office, *Federal Firearms Licensees: Various Factors Have Contributed to the Decline in the Number of Dealers*, at 28 (Mar. 29, 1996), <https://www.gao.gov/assets/ggd-96-78.pdf>.

¹¹ Steven Brill, *Firearm Abuse – A Research and Policy Report*, at 108 (1977), <https://www.ojp.gov/pdffiles1/Photocopy/40042NCJRS.pdf>.

1 responsible for 26,000 diverted firearms, and straw purchasers were responsible
2 for another 26,000. Unlicensed sellers were also a source of diverted firearms,
3 accounting for 23,000.¹² Unlicensed sellers range from individuals who
4 knowingly sell guns to criminals from their personal collections, to interstate gun
5 runners that purchase guns to sell to gangs and drug organizations.¹³ Firearms
6 stolen (i.e., thefts) from FFLs, residences, and common carriers involved almost
7 9000 firearms.¹⁴ Sales transactions involving multiple firearms (i.e., multiple
8 sales) were also found to be associated with diverted firearms.¹⁵ In most of the
9 investigations, ATF agents uncovered only one pathway through which guns
10 were diverted or trafficked 80.8 percent of the time.¹⁶

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17 ¹² *Following the Gun: Enforcing Federal Laws Against Firearms*
18 *Traffickers*, *supra* note 2.

19 ¹³ *Id.*

20 ¹⁴ *Id.*

21 ¹⁵ *Id.*

22 ¹⁶ *Id.*

1 12. A summary description of key sources of firearm diversion is
2 included below. These channels have persisted over time¹⁷ and continue to be
3 major sources of firearm diversion today.¹⁸
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10 ¹⁷ Anthony A. Braga, et al., *Interpreting the Empirical Evidence on Illegal*
11 *Gun Market Dynamics*, 89 J. URBAN HEALTH: BULLETIN NEW YORK ACADEMY
12 MEDICINE 779 (June 2012).

13 ¹⁸ U.S. Dep't of Justice & Bureau of Alcohol, Tobacco, Firearms and
14 Explosives, *National Firearms Commerce and Trafficking Assessment (NFCTA):*
15 *Firearms in Commerce – Volume Two: Crime Gun Intelligence and Analysis*
16 (Jan 11, 2023), [https://www.atf.gov/firearms/national-firearms-commerce-and-](https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-crime-guns-volume-two)
17 [trafficking-assessment-nfcta-crime-guns-volume-two](https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-crime-guns-volume-two); U.S. Dep't of Justice &
18 Bureau of Alcohol, Tobacco, Firearms and Explosives, *National Firearms*
19 *Commerce and Trafficking Assessment: Firearms in Commerce – Volume One:*
20 *Firearms in Commerce* (May 5, 2022), [https://www.atf.gov/firearms/docs/repor](https://www.atf.gov/firearms/docs/report/national-firearms-commerce-and-trafficking-assessment-firearms-commerce-volume/download)
21 [t/national-firearms-commerce-and-trafficking-assessment-firearms-commerce-](https://www.atf.gov/firearms/docs/report/national-firearms-commerce-and-trafficking-assessment-firearms-commerce-volume/download)
22 [volume/download](https://www.atf.gov/firearms/docs/report/national-firearms-commerce-and-trafficking-assessment-firearms-commerce-volume/download).

Key Sources of Firearm Diversion¹⁹	
Source	Description
Gun shows	Temporary and informal gathering of purchasers and sellers for the purpose of conducting firearms transactions.
Straw purchases	Purchasers who buy guns on behalf of those who are prohibited because of their age, criminal record, or other status.
Multiple sales	Two or more firearms purchased by an unlicensed person within a five-day period.
Theft	Firearms stolen from commercial places, common carriers, and other locations.
Nonstore/ nonstocking FFL dealers	Licensed firearms marketers known as “basement bandits,” “kitchen table” dealers, and “car trunk” dealers who operate out of their residences, vehicles, and other noncommercial premises to sell firearms to prohibited persons, through an illegal method, or for an illegal purpose.
Unscrupulous or corrupt FFLs and unlicensed sellers	Licensed firearms marketers (FFLs) who are allied with the criminal element and unlicensed “street” dealers who buy firearms with the purpose of reselling them to prohibited persons, through an illegal method, or for an illegal purpose.

¹⁹ Kevin D. Bradford, et al., *Countermarketing in the Courts: The Case of Marketing Channels and Firearm Diversion*, 24 J. PUB. POLICY & MKTG. 284 (2005), <https://www.jstor.org/stable/30000666>.

1 13. Virtually all guns used in crime originate with a licensed dealer²⁰
 2 and first pass through the “primary,” or legal, market distribution system.²¹ One
 3 early study found that 94% of the total number of surveyed handguns used in
 4 serious crime were sold initially by retail dealers.²² Today, FFLs remain the
 5 primary source of diverted firearms.²³

6 14. Because federal firearms licensees have access to a large volume of
 7 firearms, they are associated with and can influence the number of firearms
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 11 ²⁰ *Federal Firearms Licensing: Hearing Before the Subcommittee on*
 12 *Crime and Criminal Justice of the House Committee on the Judiciary, June 17,*
 13 *1993, 103d Cong. 69 (1994),* [https://www.ojp.gov/pdffiles1/Digitization/15079](https://www.ojp.gov/pdffiles1/Digitization/150790NCJRS.pdf)
 14 [0NCJRS.pdf](https://www.ojp.gov/pdffiles1/Digitization/150790NCJRS.pdf).

15 ²¹ U.S. Dep’t of the Treasury, Office of Enforcement & Bureau of Alcohol,
 16 Tobacco and Firearms, *A Progress Report: Gun Dealer Licensing and Illegal*
 17 *Gun Trafficking*, at intro (Jan. 1997).

18 ²² *Federal Firearms Act of 1976*, H.R. Rep. No. 94-1103, at 26 (1976).

19 ²³ *National Firearms Commerce and Trafficking Assessment (NFCTA):*
 20 *Firearms in Commerce – Volume Two: Crime Gun Intelligence and Analysis;*
 21 *National Firearms Commerce and Trafficking Assessment: Firearms in*
 22 *Commerce – Volume One: Firearms in Commerce*, *supra* note 18.

1 illegally diverted.²⁴ For example, although FFLs were involved in just under 10%
 2 of trafficking investigations, they were associated with the largest number of
 3 diverted firearms — suggesting their significant role in diversion and that
 4 prevention efforts on their part can also disproportionately reduce overall
 5 diversion.²⁵

6 15. FFL dealers have been identified as a key point of control to limit
 7 the risk of diversion.²⁶ The Gun Control Act of 1968 recognizes this as the basis
 8 for setting up a system in which only licensed dealers can sell firearms, and
 9 subjecting dealers to certain rules.²⁷

10 16. As described, FFL dealers may contribute to diversion in many
 11 ways. This includes retailers becoming allied with criminals to engage in illegal
 12 sales.²⁸ They may also sell guns to illegal purchasers, as in the case of
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14 ²⁴ *Following the Gun: Enforcing Federal Laws Against Firearms*
 15 *Traffickers*, *supra* note 2, at 15.

16 ²⁵ *Id.* at xi.

17 ²⁶ 103d Cong. 69 (1994), *supra* note 20, at 5.

18 ²⁷ *Id.* at 1.

19 ²⁸ Jeffrey Spiegler & John Sweeney, *Gun Abuse in Ohio*, ADMINISTRATION
 20 OF JUSTICE COMM., AFFILIATE OF GOVERNMENTAL RESEARCH INSTITUTE (June
 21 1975) (included in appendix to 1975 Congressional hearings Part 4 (Cleveland),
 22 pp. 1510, 1584).

1 nonstorefront “kitchen table” gun dealers who conduct sales out their homes,²⁹
 2 their automobiles,³⁰ through businesses that do not stock firearms or take
 3 precautions against theft,³¹ and at gun shows.³²

4 17. FFL dealers may also contribute to diversion through failing to take
 5 precautions to avert straw-purchase transactions,³³ not being cognizant of the
 6 association of multiple purchases of sales occurring in a single transaction or over
 7 a short period and their criminal use,³⁴ and not being sensitive to other factors
 8 related to diversion *e.g.*, differences in regulations across states,³⁵ geographical
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10 ²⁹ Julius Wachtel, *supra* note 9, at 222.

11 ³⁰ *Federal Firearms Licensees: Various Factors Have Contributed to the*
 12 *Decline in the Number of Dealers*, *supra* note 10, at 28.

13 ³¹ Steven Brill, *supra* note 11, at 108.

14 ³² U.S. Dep’t of the Treasury & U.S. Dep’t of Justice, *Gun Shows: Brady*
 15 *Checks and Crime Gun Traces*, at 8 (Jan. 1999).

16 ³³ U.S. Dep’t of Justice, *Gun Violence Reduction: National Integrated*
 17 *Firearms Violence Reduction Strategy*, at 30 (2001), [https://www.justice.gov/ar](https://www.justice.gov/archives/opd/gunviolence.htm)
 18 [chive/opd/gunviolence.htm](https://www.justice.gov/archives/opd/gunviolence.htm).

19 ³⁴ H.R. Rep. No. 94-1103, *supra* note 22, at 28.’

20 ³⁵ Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for*
 21 *Reforming Gun Industry Misconduct*, 18 ST. LOUIS PUB. L. REV. 247, 269 (1999),
 22 <https://scholarship.law.slu.edu/plr/vol18/iss1/12>.

1 influences,³⁶ and such phenomena as the “time to crime” (i.e., an unusually short
2 sale-to-crime interval is considered an indicator of firearm diversion).³⁷

3 18. Finally, among other factors, FFL dealers may also contribute to
4 diversion through ignoring ATF regulations,³⁸ failing to maintain records, or
5 refusing to cooperate in providing records helpful to others interested in limiting
6 its risk.³⁹

7 **B. Concrete Steps for the Firearm Industry to Limit Firearm Diversion**
8 **Have Long Been Publically Advanced**

9 19. As early as 1976, members of Congress recognized the problem of
10 firearm diversion and the sources from which criminals acquire their guns.⁴⁰

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13 ³⁶ *Following the Gun: Enforcing Federal Laws Against Firearms*
14 *Traffickers*, *supra* note 2, at 42.

15 ³⁷ Julius Wachtel, *supra* note 9, at 224.

16 ³⁸ Glenn L. Pierce, et al., THE IDENTIFICATION OF PATTERNS IN FIREARMS
17 TRAFFICKING: IMPLICATIONS FOR FOCUSED ENFORCEMENT STRATEGIES – A
18 REPORT TO THE U.S. DEP’T OF TREASURY BUREAU OF ALCOHOL, TOBACCO AND
19 FIREARMS OFFICE OF ENFORCEMENT, WASHINGTON, DC 5 (Jan. 1995).

20 ³⁹ *Gun Violence Reduction: National Integrated Firearms Violence*
21 *Reduction Strategy*, *supra* note 33, at 9.

22 ⁴⁰ H.R. Rep. No. 94-1103, *supra* note 22.

20. In 1997, then President Bill Clinton identified the ease with which children and others legally prohibited from possessing firearms can acquire firearms as a “major national problem.”⁴¹ In response, he established the specific goal of making it more difficult for firearms to pass into the illegal market.⁴²

21. Early reports from ATF confirm that firearm diversion is a significant aspect of gun crime.⁴³ The United States Department of Justice (DOJ) also recognized that members of the industry must do much more to design and distribute their products to reduce the problem of crime guns.⁴⁴

22. A basic and straightforward approach for addressing the problem of firearm diversion was identified as early as 1975 by then ATF Director Rex Davis: “It is my opinion that handgun control must be approached by looking first at the source of the guns and how they enter into and remain in circulation.”⁴⁵

⁴¹ *A Progress Report: Gun Dealer Licensing and Illegal Gun Trafficking*, *supra* note 21.

⁴² *Id.*

⁴³ *Gun Shows: Brady Checks and Crime Gun Traces*, *supra* note 32.

⁴⁴ *Gun Violence Reduction: National Integrated Firearms Violence Reduction Strategy*, *supra* note 33, at 39.

⁴⁵ *Firearms Legislation: Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 94th Cong. 150 (1975).

23. In 2001, the U.S. Department of Justice outlined steps that gun manufacturers and importers could take to limit the risk of diversion.⁴⁶ These include to “identify and refuse to supply dealers and distributors that have a pattern of selling guns to criminals and straw purchases; develop a continual training program for dealers and distributors covering compliance with firearm laws, identifying straw-purchase scenarios and securing inventory; and develop a code of conduct for dealers and distributors, requiring them to implement inventory, store security, policy and record keeping measures to keep guns out of the wrong hands, including policies and postpone all gun transfers until NICS [background] checks are completed.”⁴⁷

24. Researchers have also identified concrete steps that firearm industry members can take to reduce the rate and risks of firearm diversion for each of the primary pathways of firearm diversion.⁴⁸ These categories of safeguarding strategies and tactics are shown in the table attached as Exhibit 2, and further discussed below.

25. **Gun Shows.** To reduce firearm diversion that occurs through gun shows, firearm industry members can require full background checks for all gun

⁴⁶ *Gun Violence Reduction: National Integrated Firearms Violence Reduction Strategy*, *supra* note 33, at 39.

⁴⁷ *Id.* at 34.

⁴⁸ *See* Kevin D. Bradford, et al., *supra* note 19.

1 show sales, and can maintain records about all gun show purchases. Firearm
2 industry members can also require that any of their firearms sold at gun shows
3 occur through licensed FFLs. They can enact strict controls of firearms at gun
4 shows, including tracking inventory and displays. Members can also monitor
5 such shows and have random compliance inspections.

6 26. Other potential precautionary measures include prohibiting sales to
7 distributors or dealers who sell firearms at gun shows, or to limit downstream
8 distribution to only authorized distributors and dealers. Another option is to
9 require distribution agreements and codes of conduct by distributors and dealers
10 to raise awareness of the dangers of firearm diversion through gun shows and to
11 encourage reasonable precautions to prevent their occurrence. Such agreements
12 can also be used to impose consequences on distributors and dealers who fail to
13 comply with such codes of conduct.

14 27. **Straw Purchases and Multiple Sales.** To reduce firearm diversion
15 occurring through straw purchases and multiple sales (which have been
16 associated with the occurrence of firearm diversion), firearm industry members
17 can ensure their employees are trained on identifying and deterring straw
18 purchases and multiple purchase scenarios. Members can also require mandatory
19 recordkeeping and sharing of purchases sufficient to monitor the occurrence of
20 multiple sales. Members can also impose restrictions on multiple sales by limiting
21 sales to just one firearm per month per buyer, which can guard against their
22 occurrence. Upstream firearm industry members can provide straw purchase

1 detection and deterrence training and can institute monitoring and compliance
2 inspections to ensure that these limitations are being followed.

3 28. To exert influence and aid in the adoption of these efforts, upstream
4 firearm industry members can reduce the number of intermediaries in their sales
5 channels and permit sales only through direct channels, or through retailers
6 dedicated to their brand (i.e., exclusive channels) or to brands like theirs (i.e.,
7 selective channels). As with gun shows, distribution agreements and codes of
8 conduct can also be relied upon to encourage and impose consequences on
9 dealers who fail to comply and thereby provide an effective deterrent measure to
10 reduce straw purchases and multiple purchases.

11 29. Theft. To deter and safeguard against diversion occurring through
12 thefts, firearm industry members can require mandatory recordkeeping of
13 purchases to track missing firearms. Distributors and dealers can adopt inventory
14 tracking and security plans, run background checks on employees, institute
15 guidelines and training on inventory management and safe storage, require
16 mandatory liability insurance coverage, use secure carriers and no discerning
17 shipment labels, and monitor and conduct compliance inspections. And upstream
18 firearm industry members can also require downstream partners (i.e., distributors,
19 buying groups, retailers, etc.) to adopt these measures and to provide information
20 regarding their inventory tracking systems, and can institute mandatory reporting
21 protocols for inventory shortages or lost or stolen firearms.
22

1 30. To exert influence and aid in adoption of these efforts, upstream
2 firearm industry members can reduce the number of intermediaries (e.g.,
3 distributors, buying groups, wholesalers, etc.) in their sales chains and permit
4 sales only directly to retailers, through approved intermediaries, and/or through
5 exclusive and selective channels. As with gun shows and other sources of firearm
6 diversion, distribution agreements and codes of conduct can be an effective tool
7 to encourage and impose consequences on distributors and dealers who fail to
8 comply.

9 31. **Nonstore and Nonstocking Dealers.** To reduce firearm diversion
10 through nonstore and nonstocking dealers (i.e., dealers who do not operate out of
11 a storefront), upstream firearm industry members can require information about
12 the nature of the premise, location, hours of operation, and merchandizing
13 confirmation of such dealers, and also require photographs of distributor and
14 dealer premises to verify that firearms are only being sold at brick-and-mortar
15 retailers. Members can also require distributors and dealers to have firearms as
16 their primary business and require a retail place of business to become a retailer.

17 32. Upstream firearm industry members can also require nonstore and
18 nonstocking dealers to carry a full line of products and invest in minimum levels
19 of merchandising and promotion to qualify as a distributor or dealer, thereby
20 establishing standards and creating financial incentives for limiting diversion. As
21 with the other channels for firearm diversion, members can monitor and conduct
22 compliance inspections as well. Additionally, members can refuse to deal with

1 Internet dealers and limit distribution channels to only authorized distributors and
2 dealers. As with the other channels for diversion, distributor agreements and
3 codes of conduct can also be an effective precautionary measure to encourage
4 and impose consequences on distributors and dealers who fail to comply.

5 33. Unscrupulous FFLs. To reduce firearm diversion through
6 unscrupulous FFLs, upstream firearm industry members can require confirmation
7 of distributor and dealer licenses and permits. They can maintain information
8 about the nature of the dealer's or distributor's hiring practices, employee
9 qualifications, and training for employees. They can also require mandatory
10 retention and reporting of ATF "trace" requests, which are requests from ATF
11 used to track where and how a gun used in a crime was obtained.

12 34. Members can also require certification of compliance with state and
13 local law and licensing provisions and verify the FFL status of a distributor or
14 dealer before agreeing to sell to them. Members can require dealers or distributors
15 to conduct background checks on their employees, and provide mandatory
16 training on laws and regulations. As with the other channels for firearm diversion,
17 members can monitor and have compliance inspections, and terminate
18 relationships with those who violate the law or fail to comply with safeguard
19 requirements.

20 35. Additionally, where the information is available, members can
21 refuse to sell firearms to people with known criminal indictments or high levels
22 of crime guns. They can also require that any sales be made directly to the retailer

1 (versus through a distributor or other intermediary) and by disallowing transfers
2 or sales from dealer-to-dealer, thereby permitting the manufacturer or distributor
3 more oversight of the retailer. They can also establish corporate-owned
4 distributors and dealers to enable them to exert more direct control. Distribution
5 agreements and codes of conduct can also be used to encourage and impose
6 consequences on distributors and dealers who fail to comply.

7 36. Many, if not all, of the aforementioned strategies for limiting the
8 various sources of firearm diversion can be applied to limit firearm diversion
9 occurring through unlicensed sellers.

10 **C. The Firearm Industry Itself Has Long Understood the Necessary**
11 **Steps to Limit Firearm Diversion**

12 37. Members of the industry have been aware of the problem of firearm
13 diversion for some time. They have also discussed the need to limit its occurrence
14 and the steps needed to do so.

15 38. In July 1993, for example, an NSSF memo prepared by then NSSF
16 Marketing Director, Doug Painter, offers a scathing critique of gun
17 manufacturers' distribution systems and calls for a "proactive industry strategy"
18 to: (1) address the "potential for illegal firearms transactions through ostensibly
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1 ‘legal’ FFL channels,” and (2) “minimiz[e] the possibility of illegal transactions
2 through unscrupulous FFL holders.”⁴⁹

3 39. Similarly, in February of 1996, former Senior Vice President of
4 Marketing and Sales for Smith & Wesson, Robert Hass, stated in a sworn
5 affidavit that members of the gun “industry as a whole are fully aware of the
6 criminal misuse of handguns.”⁵⁰

7 40. Many members of the firearm industry have previously been found
8 in a federal district court to have been aware of the different forms of firearm
9 diversion or to have received trace requests suggesting their awareness.⁵¹
10 Empirical research also offers evidence of their knowledge of the different forms
11 of firearm diversion.⁵²

12 41. As early as 1993, NSSF and other firearm industry members
13 understood that focusing on the sources of diversion and taking steps to limit
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15 ⁴⁹ See Report of Gregory T. Gundlach, *N.A.A.C.P. v. A.A. Arms Inc.*,
16 No. 1:99-cv-03999 (JBW) (E.D.N.Y. July 16, 1999); *N.A.A.C.P. v. Accusport*
17 *Corp.*, No. 1:99-cv-07037 (E.D.N.Y. Oct. 29, 1999).

18 ⁵⁰ *Id.*

19 ⁵¹ *Id.*

20 ⁵² Gregory T. Gundlach, et al., *Marketers’ Knowledge and Actions Against*
21 *Illegal Demand Withing the U.S. Firearms Industry: A Framework and Evidence*
22 *for Addressing Gun Violence* (2023) (unpublished manuscript).

1 these sources offered a “thesis” and “framework” through which they could
2 address firearm diversion.⁵³

3 42. In 1994, the Sporting Arms and Ammunition Manufacturers’
4 Institute (SAAMI) decided to “take the initiative” and set “the agenda, defining
5 the issues and leading the discussion not allowing others to do so for us.”⁵⁴
6 Recommendations for limiting firearm diversion were developed, including a
7 proposal to establish a “Safety Board” and to develop a retailers’ “Code of
8 Ethics” that called for firearm retailers to “go beyond” existing regulations and
9 adhere to “standards of responsible” retailing, including to not knowingly sell
10 firearms suspected to being “purchased for delivery to another individual
11 (strawpurchase).”⁵⁵

12 43. In January 1995, Art Wheaton of Remington Arms Co., a member
13 of the NSSF Board of Governors, suggested that SAAMI “may have an
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16 ⁵³ See Report of Gregory T. Gundlach, *supra* note 49 (Discussing the ATF
17 report Operation Snapshot (1993), Mr. Painter writes that, “In our opinion, the
18 new study ‘Operation Snapshot’ can provide not only the thesis for a constructive
19 proactive position, but also an appropriate and timely framework for industry
20 response.”).

21 ⁵⁴ *Id.*

22 ⁵⁵ *Id.*

1 opportunity to take a chapter from the Alcohol and ATV industries to put forth a
2 major safety campaign” to address firearm diversion.⁵⁶

3 44. In November 1996, after Mr. Painter of NSSF attended an American
4 Association of Suicidology Conference on Youth Suicide by Firearms, he
5 recommended that the SAAMI Safety Committee “research . . . the effectiveness
6 of specific safety programs,” “[r]eview and assess technical and other product
7 developments,” and “[s]erve as a clearinghouse for industry safety information
8 and developments.”⁵⁷

9 45. A March 17, 2000 agreement signed by Smith & Wesson offers
10 further evidence of industry members’ knowledge of how to limit firearm
11 diversion. The agreement’s provisions included sales and distribution controls to
12 help keep guns out of the hands of criminals, help law enforcement solve gun
13 crimes, and reduce firearms accidents, including through required background
14 checks at gun shows. Other safeguards included manufacturers instituting a
15 standard of conduct for dealers with whom they worked to make every effort to
16 eliminate sales of firearms that might lead to illegal possession and/or misuse by
17 criminals, juveniles, and other prohibited persons, including through recognized
18 sources of diversion. Provisions also contemplated actions against dealers who
19

20
21 ⁵⁶ *Id.*

22 ⁵⁷ *Id.*

1 violated the standard and steps to limit such violations.⁵⁸ According to the U.S.
 2 Department of Justice, the agreement represented commonsense, practical
 3 measures that could be embraced by the gun industry as a matter of responsible
 4 business practices.⁵⁹

5 **1. NSSF's guidance for the firearm industry for safeguarding**
 6 **against diversion**

7 46. For some time, NSSF specifically has offered information,
 8 programs, and materials to members of the firearm industry for safeguarding
 9 against firearm diversion and the misuse of firearms.

10 47. **Project ChildSafe**. Started around 1999, Project Homesafe (now
 11 "Project Childsafe")⁶⁰ involves a partnership by the NSSF with law enforcement
 12 agencies nationwide to distribute free firearm safety kits, including free locking
 13 devices for inclusion by manufacturers with the sale of new firearms. According
 14 to the NSSF, more than 70 million free locking devices have been included with
 15 the sale of new firearms since 1998.

18 ⁵⁸ *Id.*

19 ⁵⁹ *Id.*

20 ⁶⁰ National Shooting Sports Foundation, *Project ChildSafe*,
 21 <https://www.nssfreesolutions.org/programs/project-childsafe/> (last visited
 22 May 23, 2023).

1 48. **Don't Lie for the Other Guy.** Started in 2000, “Don't Lie for the
 2 Other Guy”⁶¹ involves a partnership by NSSF with the ATF to reduce firearm
 3 diversion resulting from straw purchases through an educational program to
 4 assist firearm retailers in detecting and preventing straw purchases. The goal of
 5 the program is to reduce firearm straw purchases at the retail level and to educate
 6 would-be straw purchasers of the penalties of knowingly participating in an
 7 illegal firearm purchase. The program includes a kit that contains education
 8 information and online resources, including numerous videos about how dealers
 9 can detect and prevent straw purchasing of guns.

10 49. **Suicide Prevention.** Begun in 2016, the NSSF's suicide prevention
 11 initiative and program⁶² involves a partnership with the American Foundation for
 12 Suicide Prevention to develop a suicide prevention toolkit to help firearms
 13 retailers and others understand risk factors and warning signs related to suicide,
 14 and to understand where to find help and encourage secure firearms storage
 15 options.

16
 17 ⁶¹ National Shooting Sports Foundation, *Don't Lie for the Other Guy*,
 18 <https://www.nssfreesolutions.org/programs/dont-lie/> (last visited May 23,
 19 2023).

20 ⁶² National Shooting Sports Foundation, *Suicide Prevention*,
 21 <https://www.nssfreesolutions.org/programs/suicide-prevention/> (last visited
 22 May 23, 2023).

1 50. The program includes a toolkit, documents, podcasts, and other
 2 education materials. The toolkit is free to order and contains a poster, counter
 3 cards, window signs, a brochure for customers, and a brochure providing
 4 guidance in the event a business experiences a suicide. As part of the educational
 5 aspects of the program, dealers are asked to educate their staff about warning
 6 signs, risk factors, and intervention techniques by having them watch the NSSF's
 7 "SHOT" University e-learning module.

8 51. **Operation Secure Store**. Launched in 2017, "Operation Secure
 9 Store"⁶³ involves a partnership by the NSSF with the ATF to reduce firearm
 10 diversion resulting from firearm thefts and burglaries through educational
 11 programming, including an ongoing series of regional seminars hosted by ATF.
 12 Additionally, NSSF matches ATF reward offers for information regarding
 13 firearm burglary and theft.

14 52. The program also includes numerous videos, research and data, a
 15 security toolkit, and other resources. The program focuses on five areas:
 16 "Education and Awareness," "Assessment and Risk Analysis," "Planning and
 17 Strategy," "Engagement," and "Response," with a focus on providing a wide
 18

19
 20 ⁶³ National Shooting Sports Foundation, *Operation Secure Store*,
 21 <https://www.nssfreesolutions.org/programs/operation-secure-store/> (last visited
 22 May 23, 2023).

1 array of solutions to mitigate risks and protect FFLs against firearm thefts and
2 burglaries.⁶⁴

3 **2. Steps taken by firearm industry members, including Smith &**
4 **Wesson and Beretta USA, to address diversion**

5 53. Past research has shown that members of the firearm industry have
6 engaged in steps to limit firearm diversion.

7 54. A large-scale industry study of manufacturers and distributors
8 published in 2010⁶⁵ found, for example, that while safeguarding practices were
9 on average very low in the firearm industry, some manufacturers and distributors
10 participated in safeguards designed to reduce diversion through unscrupulous and
11 corrupt dealers, nonstore/nonstocking dealers, gun shows, straw purchases, and
12 thefts. According to the researchers, a hallmark of the studied safeguards was
13 their previous identification, articulation, and advancement by stakeholders from
14 the firearms industry.

15 55. As reported in the study, the more heavily adopted safeguards
16 involved diversion occurring through nonstore/nonstocking dealers, straw
17 purchases, gun shows, and unscrupulous/corrupt dealers. For diversion involving

18
19 ⁶⁴ *Id.*

20 ⁶⁵ Gregory T. Gundlach, et al., *Countermarketing and Demarketing*
21 *Against Product Diversion: Forensic Research in the Gun Industry*, 29 J. PUB.
22 POLICY & MKTG, 103 (2010), <https://www.jstor.org/stable/20798401>.

1 nonstore/nonstocking dealers, the safeguards included requiring direct dealers or
2 program dealers to have a storefront place of business and requiring that
3 distributors sell to dealers who, in turn, only sell to storefront places of business.
4 For diversion involving straw purchases, the safeguards included disseminating
5 materials on straw purchases to others in their distribution system. For diversion
6 involving gun shows, the safeguards included restricting their distributors from
7 selling at gun shows. For diversion involving unscrupulous/corrupt dealers, the
8 safeguards included refusing to sell to indicted dealers.

9 56. Both Smith & Wesson, Inc. and Beretta USA Corp. (or previously
10 affiliated entities) have previously been found in a federal district court to have
11 been aware of the different forms of firearm diversion and to have engaged in
12 safeguards to limit in various ways their occurrence.⁶⁶

13 57. Smith & Wesson, Inc. was previously found to have been aware of
14 the different forms of firearm diversion or to have received trace requests
15 suggesting their awareness, and to have engaged in safeguards to limit the
16 occurrence of firearm diversion. Smith & Wesson, Inc. engaged in safeguards to
17 limit diversion occurring through non-storefront dealers by requiring direct
18 dealers or program dealers to have a storefront place of business. Smith &
19 Wesson, Inc. was also found to have engaged in safeguards to limit diversion
20

21 _____
22 ⁶⁶ Report of Gregory T. Gundlach, *supra* note 49.

1 occurring through gun shows by restricting their distributors from selling at gun
2 shows or from selling to dealers who, in turn, sell at gun shows.

3 58. According to Smith & Wesson Inc.'s current Vice President of
4 Sales, Smith & Wesson continues to sell to independent, federally licensed
5 distributors and buying groups who, in turn, sell the products throughout the
6 United States to independent, federally licensed retailers.⁶⁷

7 59. Beretta USA was similarly previously found by a federal district
8 court to have been aware and/or knowledgeable of the different forms of firearm
9 diversion or to have received trace requests suggesting their awareness, and to
10 have engaged in safeguards to limit the occurrence of firearm diversion. Beretta
11 USA engaged in safeguards to limit diversion occurring through illegal sales by
12 ceasing sales to indicted distributors or dealers and by analyzing trace
13 information to identify problematic distributors or dealers. Beretta USA was also
14 found to have engaged in safeguards to limit diversion occurring through non-
15 storefront dealers by requiring direct dealers or program dealers to have a
16 storefront place of business, and to have engaged in safeguards to limit diversion
17 occurring through straw purchases by training others in their distribution system
18 on straw purchases.

19 60. According to Beretta USA's General Counsel, Beretta USA
20 continues to sell to independent, federally licensed distributors, who in turn sell
21

22 ⁶⁷ See ECF No. 20.

1 to independent, federally licensed retailers located throughout the United States
 2 and Beretta USA continues to sell directly to dealers located throughout the
 3 United States.⁶⁸

4 **D. Research Demonstrates that Safeguards Against Firearm Diversion**
 5 **Help Limit Its Occurrence and Resulting Harms**

6 61. Studies of the effects of safeguards against firearm diversion show
 7 that safeguards can limit the occurrence of firearm diversion and reduce its
 8 harmful effects.

9 62. Limiting “Saturday Night Specials”. One study from 2006 offers
 10 evidence that reforms to the sales practices of licensed gun dealers reduced the
 11 supply of new guns to criminals.⁶⁹ According to the study, reforms to the sales
 12 practices of just one licensed gun store—which, before May 1999, sold more than
 13 half of the guns recovered from criminals in Milwaukee—resulted in a 44 percent
 14 decrease in the flow of new guns to criminals in the city.

15 63. The changes in practice occurred after a highly publicized
 16 government study in May 1999 revealed that a single Milwaukee-area gun shop
 17 was the nation’s leading seller of guns that were later recovered from criminals.

18
 19 ⁶⁸ See ECF No. 19.

20 ⁶⁹ Daniel W. Webster, et al., *Effects of a Gun Dealer’s Change in Sales*
 21 *Practices on the Supply of Guns to Criminals*, 83 J. URBAN HEALTH 778
 22 (May 2006), <https://doi.org/10.1007/s11524-006-9073-2>.

1 Two days after the study was publicized, the dealer announced that his store
2 would no longer sell small, inexpensive handguns, sometimes known as Saturday
3 Night Specials, that are commonly used in crime.

4 64. After the change in the retailer's sales practices, researchers tracked
5 the number of guns that police recovered from criminals within one year of retail
6 sale. An unusually short sale-to-crime interval is considered an indicator of illegal
7 gun trafficking (i.e, diversion).

8 65. According to the study, the store's change in sales policy was
9 associated with a 96 percent decrease in the number of small, inexpensive
10 handguns that were recovered from criminals in Milwaukee that were recently
11 sold by the store. There was also a 42 percent reduction in other types of guns
12 sold by the gun dealer and soon recovered from a criminal.

13 66. The reductions in Milwaukee occurred abruptly after the change in
14 the dealer's sales practice and appear to be directly attributable to those
15 reforms—a finding supported by the fact that the study authors saw no change in
16 gun trafficking in three comparison cities in the Midwest.

17 67. According to the study's lead researcher, "Our study shows that
18 changes in a single gun dealer's sales practices led to a dramatic reduction in the
19 supply of new guns to criminals in Milwaukee. Increased scrutiny of the few gun
20
21
22

dealers linked to the most crime guns has the potential to significantly reduce the supply of new guns to criminals in many other U.S. cities.”⁷⁰

68. **Strong Retailer Oversight.** Another study from 2009 examined the effects of gun policies on gun trafficking by estimating the effects of key components—both individually and jointly—of a regulatory scheme designed to prevent diversion of firearms into the illicit market.⁷¹ These components included: (1) regulation and oversight of gun retailers, (2) private sales regulations requiring potential buyers to undergo a background check prior to purchasing a gun from private individuals, and (3) permit-to-purchase licensing laws that provide law enforcement agencies some discretion to deny purchase applications to those who might pose some risk.

69. The cross-sectional study of 54 US cities employed data on state laws governing gun sales, a survey of law enforcement agencies’ practices to promote compliance with gun sales laws, and crime gun trace data to examine associations between these policies and practices with gun trafficking indicators.

⁷⁰ John Hopkins, Bloomberg School of Public Health, *Reforms to Sales Practices of Licensed Gun Dealer Reduced Supply of New Guns to Criminals*, (Sept. 27, 2006), <https://publichealth.jhu.edu/2006/webster-gun-dealer>.

⁷¹ Daniel W. Webster, et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. URBAN HEALTH 525 (May 29, 2009), <https://doi.org/10.1007/s11524-009-9351-x>.

70. Regulations demonstrate strong oversight of firearm dealers if the state law required: (1) a state or local dealer license, (2) record keeping of firearm sales, (3) dealers' records and premises to be available to law enforcement for inspections, and (4) prompt reporting of thefts of firearms from dealers. Regulation of private handgun sales were operationalized based upon the presence of sales regulations requiring potential buyers to undergo a background check prior to purchasing a gun from private individuals.

71. According to the results of the study, comprehensive regulation and stronger oversight of gun dealers and state regulation of private sales of handguns were each associated with significantly lower levels of intrastate gun trafficking.

72. **Nonstore/Nonstocking FFLs, Gun Shows, and Straw Purchases.** A large-scale industry study published in 2010 studied the effects of marketing and distribution safeguards directed at the six primary pathways of firearm diversion – diversion occurring through (1) unscrupulous/corrupt dealers, (2) nonstore/nonstocking FFLs, (3) guns shows, (4) straw purchases, (5) multiple sales, and (6) thefts.⁷² According to the researchers, safeguards directed at diversion through nonstorefront/nonstocking dealers, gun shows, and straw purchases were found to significantly reduce diversion. A hallmark of each the studied safeguards were their previous identification, articulation, and advancement by stakeholders within the firearms industry.

⁷² Gregory T. Gundlach, et al., *supra* note 65.

1 73. The study examined an array of safeguards for each of the different
2 pathways of diversion. For example, safeguards against diversion occurring
3 through nonstore/nonstocking retailers included whether a manufacturer
4 analyzed trace information to identify problem distributors or dealers, and
5 whether a manufacturer had stopped, would not sell, or would stop selling to
6 indicted dealers.

7 74. Safeguards against diversion occurring through guns shows
8 included whether a manufacturer restricted their distributors from selling at guns
9 shows, restricted their distributors from selling to dealers who, in turn, sell at gun
10 shows, and restricted their direct or program dealers from selling at gun shows.

11 75. Safeguards against diversion occurring through straw purchases
12 included whether a manufacturer had disseminated materials on straw purchases
13 to others in their distribution system and trained others in their distribution system
14 on straw purchases.

15 76. As concluded by the researchers, the safeguarding efforts engaged
16 in were found to be associated with a reduction in firearm diversion.⁷³

17 77. **Permitting, Background Checks, and Oversight of Gun Retailers.**
18 A review, published in 2015, of available evidence from studies published
19
20

21 _____
22 ⁷³ *Id.* at abstract.

1 between 1999 and August 2014 examined the effects of policies designed to keep
2 firearms from high-risk individuals in the United States.⁷⁴

3 78. According to the results, certain laws intended to prevent prohibited
4 persons from accessing firearms—including strong regulation and oversight of
5 gun dealers—are associated with reductions in diversion of guns to criminals.

6 79. As concluded by the researchers, “[m]ounting evidence indicates
7 that certain laws intended to increase the accountability of firearm sellers to avoid
8 risky transfers of firearms are effective in curtailing the diversion of guns to
9 criminals”⁷⁵

10 80. **Multiprong Retail Firearm Inventory Security**. An NSSF 2023
11 publication reports that firearms stolen during FFL burglaries dropped by nearly
12 65 percent over 5 years (2017-2021) and that a multipronged approach to retail
13 firearm inventory security was associated with this reduction in stolen firearms.⁷⁶

14
15 ⁷⁴ Daniel W. Webster & Garen J. Wintemute, *Effects of Policies Designed*
16 *to Keep Firearms from High-Risk Individuals*, 36 ANN. REV. PUB. HEALTH 21
17 (Mar. 2015), [https://www.annualreviews.org/doi/10.1146/annurev-publhealth-](https://www.annualreviews.org/doi/10.1146/annurev-publhealth-031914-122516)
18 [031914-122516](https://www.annualreviews.org/doi/10.1146/annurev-publhealth-031914-122516).

19 ⁷⁵ *Id.* at 34.

20 ⁷⁶ Larry Keane, *AFT Data Confirms ‘Operation Secure Store’ Has Positive*
21 *Impact*, NATIONAL SHOOTING SPORTS FOUNDATION (Mar. 17, 2023)
22 <https://www.nssf.org/articles/atf-data-confirms-operation-secure-store-has->

81. The multi-prong approach involved “Education and Awareness,” “Assessment and Risk Analysis,” “Planning and Strategy,” “Engagement” and “Response” to help retailers enhance the security of their retail firearm inventory.⁷⁷ The approach was developed as part of the NSSF’s Operation Secure Store, a partnership by NSSF with ATF and DOJ to provide brick-and-mortar firearm retailers with educational resources and services to better secure their inventory and reduce robberies and burglaries.

82. According to NSSF President and CEO Joe Bartozzi in testimony to the Connecticut state legislature’s Joint Judiciary Committee: “Retailers are the first line of defense against criminals and would-be criminals.”⁷⁸ Referring to NSSF’s Operation Secure Store, as described by Mr. Bartozzi, when neighborhood firearm retailers use industry tools and resources to improve their inventory security, they are backstopping against possible criminal behavior that could endanger their communities.⁷⁹

[positive-impact/#:~:text=New%20ATF%20Data%20on%20FFL,criminals%20takes%20a%20monumental%20effort](#) (Special note: The publication does not report the methodology employed to determine the reported results.).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

1 83. **Informational Campaigns**. A recent study from 2023 examined the
2 effects of manufacturers' awareness and knowledge of the different pathways
3 through which firearms are diverted, and their likelihood of taking precautionary
4 measures to limit the occurrence of firearm diversion.⁸⁰ The research shows that
5 increasing awareness and knowledge of the pathways for firearm diversion
6 increases the likelihood that manufacturers will take precautionary measures to
7 safeguard against diversion of their firearms.

8 84. As reported by the researchers, manufacturers' awareness and
9 knowledge of specific sources of diversion significantly increased the probability
10 that the manufacturer would use a safeguard to limit its occurrence. This result
11 was found for manufacturers that possessed knowledge of diversion occurring
12 through nonstore/nonstocking firearm dealers, straw purchases, unscrupulous
13 firearm dealers, gun shows, and diversion occurring due to thefts.

14 85. According to the researchers, the results support the view that
15 actions like informational and educational campaigns to improve firearm
16 marketers' awareness and knowledge of illegal demand for their firearms can
17 help to reduce gun violence.

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22 ⁸⁰ Gregory T. Gundlach, et al., *supra* note 52.

E. Limiting the Distribution Risks Associated with Firearms is Consistent With Broader Concepts of Countermarketing and Demarketing

86. Efforts to safeguard against firearm diversion are consistent with, and follow from, more basic principles of marketing and marketing management known as “countermarketing” and “demarketing.”

87. First advanced over 50 years ago, conceptions of marketing management as “demand management” provide the foundation for these concepts (i.e., countermarketing and demarketing) and their application to circumstances involving unwanted demand for a good or service.⁸¹

88. **Unwholesome Demand.** In addition to creating and maintaining demand for a good or service, at times, marketers may also be confronted with unwanted demand.⁸² This can include too much demand for a firm’s capacity (e.g., a sold-out hotel or overbooked airplane, etc.), but also unwholesome demand. Unwholesome demand is the desire for goods, services, or activities that reduce individual and social welfare. Classic examples of industries with significant unwholesome demand include many of the so-called vice products: alcohol and related products, tobacco and related products, illicit and prescription

⁸¹ Philip P. Kotler & Sidney Levy, *Demarketing, Yes, Demarketing*, 49 HARV. BUS. REV. 74 (1971).

⁸² Philip P. Kotler, *The Major Tasks of Marketing Management*, 37 J. MKTG. MGMT. 42 (Oct. 1973), <https://doi.org/10.2307/1250357>.

1 drugs, and other products for which safety or other societal concerns exist.⁸³ In
 2 the firearms context, this would include the purchase and use of firearms by
 3 unauthorized and at-risk persons and for use in crime.

4 89. Following basic principles of marketing management, when
 5 confronted with unwholesome demand, the marketer's "task" is to engage in
 6 countermarketing or demarketing to counter or limit the demand. Demarketing
 7 involves discouraging demand in general or on the part of a certain class of
 8 customers, either temporarily or on a continuing basis.⁸⁴ Countermarketing, a
 9 stronger strategy, involves total repudiation of the relevant demand, such as by
 10 getting rid of undesirable customers, or preventing certain types of transactions.⁸⁵

11 90. Many strategies for countermarketing and demarketing a good or
 12 service are available to marketers -- prices may be raised, product quality may be
 13 altered, service and promotion can be reduced and/or convenience altered.⁸⁶
 14
 15
 16

17 ⁸³ Thomas C. Kinnear & Cynthia J. Frey, *Demarketing of Potentially*
 18 *Hazardous Products: General Framework and Case Studies*, 7 J. CONTEMP. BUS.
 19 57 (1979).

20 ⁸⁴ Kevin D. Bradford, et al., *supra* note 19.

21 ⁸⁵ *Id.*

22 ⁸⁶ *Id.*

1 Indeed, the concepts of countermarketing and demarketing extend to all aspects
2 of marketing management.⁸⁷

3 91. Accounts of the application of countermarketing and demarketing
4 are widely documented in the marketing literature. This includes, for example,
5 countermarketing and demarketing to encourage conservation during energy
6 shortages through reduction in the number of retail outlets sold to, retail product
7 allocation systems, requirements for reduced hours of retail operation, and
8 discontinuance of promotional incentives. It also includes countermarketing and
9 demarketing to manage tourism and preserve natural resources through increased
10 prices, restrictive access permits, and persuasive promotional campaigns.⁸⁸ It
11 further includes countermarketing and demarketing to discourage dysfunctional
12 demand for night-time emergency healthcare services through persuasive
13 communications and information.⁸⁹

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16 ⁸⁷ *Id.*

17 ⁸⁸ Sue Beeton & Richard Benefield, *Demand Control: The Case for*
18 *Demarketing as a Visitor and Environmental Management Tool*,
19 10 J. SUSTAINABLE TOURISM 497 (2002),

20 ⁸⁹ Annabelle Mark & Richard Elliott, *Demarketing Dysfunctional Demand*
21 *in the UK National Health Service*, 12 INT’L J. HEALTH PLANNING & MGMT. 297
22 (Dec. 4, 1998).

92. Applied to the problem of firearm diversion, countermarketing and demarketing encompasses not only the design and management of a manufacturer's or distributor's retail distribution system and strategy, but also their design and management of other marketing strategies. This includes promotional strategies (e.g., advertising campaigns, sales practices, etc.), product strategies (e.g., product design, accessories, etc.), and pricing strategies (e.g., initial price, price management, etc.). Thus, countermarketing and demarketing applied to firearm diversion contemplates a comprehensive approach to reducing its occurrence.

93. The previously described "Strategies to Limit Firearm Diversion" (*see* Exhibit 2) reflect the application of countermarketing and demarketing strategies to reduce firearm diversion for each of the primary pathways of firearm diversion.⁹⁰

F. Other Industries Involving Dangerous Products Regularly Adopt Safeguards to Limit Marketing and Distribution Risks

94. Many companies that market products which have the potential for harm adopt safeguards to limit the marketing and distribution risks associated with their products, specifically with regard to selling to unauthorized persons or selling for persons who will divert the product to illegal use.

⁹⁰ *See also* Kevin D. Bradford, et al., *supra* note 19.

1 95. **Tobacco**. The “We Card”⁹¹ program is a manufacturer advised and
 2 supported organization serving the nation’s tobacco retailers (and other age-
 3 restricted products). Under the program, retailers are considered to play a “critical
 4 role in preventing the sale of age-restricted products to underage customers.”⁹²
 5 Participants in the program receive access to a wide array of educational and
 6 training programs and materials to limit the purchase of tobacco products by
 7 minors.

8 96. Among other materials, the program includes a “Retailer Pledge”;
 9 an e-learning center; a template for developing retailer product sales policies; a
 10 “Guide to Best Practices;” a catalog containing point-of-purchase materials such
 11 as age-of-purchase calendars, signage, stickers, decals, guides and tip sheets;
 12 access to ID scanner and age verification tools and technology; initial, refresher,
 13 and booster training courses for employees and managers; and monetary
 14 incentives, among other materials.

15 97. Under the program, participating retailers utilize door and window
 16 decals, counter signs, employee pins, minimum age calendars, and hand-outs to
 17 educate and answer customer questions. A detailed employee guide and training
 18 _____

19 ⁹¹ We Card Web Center, <http://www.wecard.org> (last visited May 26,
 20 2023).

21 ⁹² We Card Web Center, *Dear Retailer Letter*, [https://www.wecard.org/d](https://www.wecard.org/dear-retailer)
 22 [ear-retailer](https://www.wecard.org/dear-retailer) (last visited May 27, 2023).

1 videos are also provided along with access to an e-learning center. The guide
 2 and training videos offer information on how to ask for an ID, how to say “no,”
 3 how to spot a fake ID, state law information and information on federal laws.

4 98. Professional trainers teach proven techniques that clerks can use to
 5 reject attempts to buy tobacco and vaping products illegally. Retailers are also
 6 offered self-assessment surveys to assist in the identification of best practices
 7 suited for their individual stores. The program also includes the termination of
 8 benefits and incentives to retailers who are fined or convicted of selling tobacco
 9 to minors.

10 99. *Alcoholic Beverages*. Distillers, producers, and suppliers of alcohol
 11 products offer training and other programs to retailers for the identification of
 12 strawman transactions and monitoring for illegal transactions.

13 100. One such program is the “Training in Intervention Procedures for
 14 Servers of Alcohol”⁹³ (TIPS) program that offers servers and sellers of alcohol
 15 products skills for serving responsibly and avoiding selling to minors, including
 16 checking IDs, managing intoxication levels, and reducing incidents of drunk
 17 driving.

21 ⁹³ Training in Intervention Procedures for Servers of Alcohol Training,
 22 <https://www.tipsalcohol.com/> (last visited May 26, 2023).

101. Another program, the “Being a Responsible Server”⁹⁴ (BARS) program, is a secret shopper program that helps keep servers and sellers vigilant about checking IDs. Participating establishments pay the BARS program to be monitored by BARS checkers who make random visits to their stores and purchase alcohol beverages.

102. **Chemical Products**. The International Council of Chemical Associations (ICCA) created the “Responsible Care”⁹⁵ program, which includes a signatory “Global Charter,”⁹⁶ formal “Commitment,”⁹⁷ and a voluntary “Stewardship Code,”⁹⁸ to “prevent the misuse and diversion of . . . chemicals for

⁹⁴ Being a Responsible Server Program <https://www.barsprogram.com/howitworks.htm> (last visited May 26, 2023).

⁹⁵ International Council of Chemical Associations, *Responsible Care*, <https://icca-chem.org/focus/responsible-care/> (last visited May 24, 2023).

⁹⁶ International Council of Chemical Associations, *Responsible Care Global Charter* (May 29, 2014), <https://icca-chem.org/wp-content/uploads/2020/06/RC-Global-Charter-FINAL.pdf>.

⁹⁷ International Council of Chemical Associations, *Responsible Care*, *supra* note 95.

⁹⁸ International Council of Chemical Associations, *Responsible Care, Voluntary Product Stewardship Practices to Prevent Diversion of 1,4-Butanediol*

1 unlawful purposes.” The code requires adherence to extensive distribution and
2 customer requirements to ensure the legitimate use of dangerous chemicals.

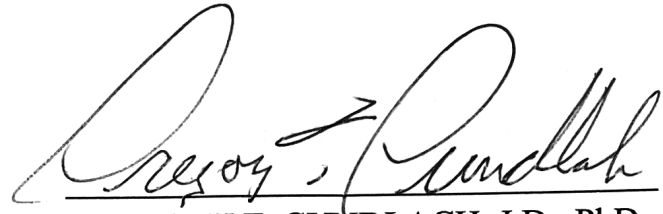
3 103. The American Chemistry Council “Responsible Care Program”⁹⁹
4 actively participates, offers guidance, and encourages its members (1) in how to
5 evaluate the risks associated with chemical distribution and employ methods to
6 reduce those risks, (2) to meet or exceed all regulations and industry standards
7 governing chemical distribution, (3) to provide emergency advice and/or
8 assistance to people on the scene in the event of a chemical distribution
9 emergency, and (4) to develop new technologies and methods to improve
10 chemical distribution safety. Participating members that participate and follow
11 their guidelines and achieve a reduction in their incident rates are given awards.
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15 *and Gamma Butyrolactone* (Apr. 5, 2017), [https://icca-chem.org/wp-](https://icca-chem.org/wp-content/uploads/2021/12/voluntary-product-stewardship-code.pdf)
16 [content/uploads/2021/12/voluntary-product-stewardship-code.pdf](https://icca-chem.org/wp-content/uploads/2021/12/voluntary-product-stewardship-code.pdf).

17 ⁹⁹ American Chemistry Council, *Responsible Care: Driving Safety &*
18 *Industry Performance*, [https://www.americanchemistry.com/chemistry-in-](https://www.americanchemistry.com/chemistry-in-america/responsible-care-driving-safety-industry-performance?gclid=CjwKCAjw67ajBhAVEiwA2g_jEHNKFFxVDz5zw7F7_fwceA5PGWR1VO1QsvBguUxOvqFboYy1H-TisRoCjFgQAvD_BwE)
19 [america/responsible-care-driving-safety-industry-](https://www.americanchemistry.com/chemistry-in-america/responsible-care-driving-safety-industry-performance?gclid=CjwKCAjw67ajBhAVEiwA2g_jEHNKFFxVDz5zw7F7_fwceA5PGWR1VO1QsvBguUxOvqFboYy1H-TisRoCjFgQAvD_BwE)
20 [performance?gclid=CjwKCAjw67ajBhAVEiwA2g_jEHNKFFxVDz5zw7F7_f](https://www.americanchemistry.com/chemistry-in-america/responsible-care-driving-safety-industry-performance?gclid=CjwKCAjw67ajBhAVEiwA2g_jEHNKFFxVDz5zw7F7_fwceA5PGWR1VO1QsvBguUxOvqFboYy1H-TisRoCjFgQAvD_BwE)
21 [wceA5PGWR1VO1QsvBguUxOvqFboYy1H-TisRoCjFgQAvD_BwE](https://www.americanchemistry.com/chemistry-in-america/responsible-care-driving-safety-industry-performance?gclid=CjwKCAjw67ajBhAVEiwA2g_jEHNKFFxVDz5zw7F7_fwceA5PGWR1VO1QsvBguUxOvqFboYy1H-TisRoCjFgQAvD_BwE) (last
22 visited May 26, 2023).

1 I declare under penalty of perjury under the laws of the State of
2 Washington and the United States of America that the foregoing is true and
3 correct.

4 DATED this 30th day of May, 2023, at Jacksonville Beach, Florida

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8 GREGORY T. GUNDLACH, J.D., PhD.
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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

I declare under penalty of perjury under the laws of the State of Washington and the United States of America that the foregoing is true and correct.

DATED this 1st day of June, 2023, at Olympia, Washington.

s/ Leena Vanderwood
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